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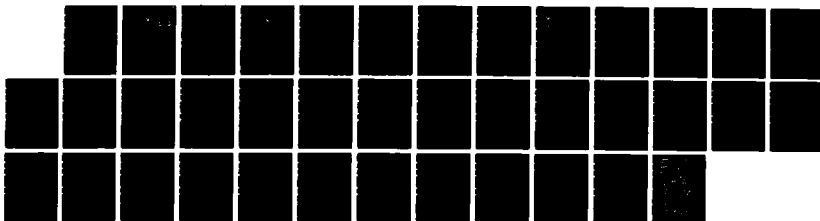
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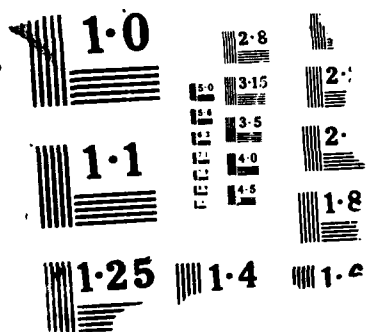
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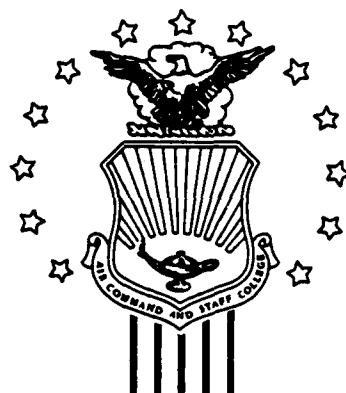
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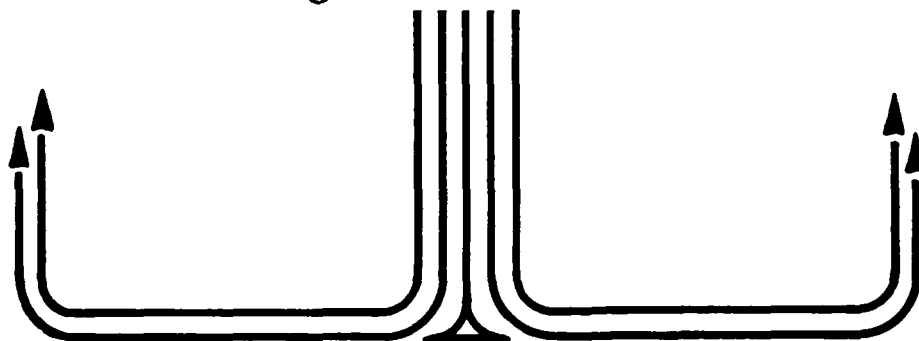
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STUDENT REPORT

BLACK HILLS V. WEINBERGER:
HOW USEFUL IS IT FOR OTHER AIR
FORCE BASES TO COMPETITIVELY
ACQUIRE ELECTRICITY?

MAJ BRYAN T. LAWLER REPORT #88-1540
"insights into tomorrow"



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88-1540

TITLE

BLACK HILLS V. WEINBERGER: HOW USEFUL IS IT FOR OTHER
AIR FORCE BASES TO COMPETITIVELY ACQUIRE ELECTRICITY?

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Submitted to the faculty in partial fulfillment of
requirements for graduation.

**AIR COMMAND AND STAFF COLLEGE
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PREFACE

It appears the Air Force will have to live with tighter budgets over the next several years. Therefore, ways to save money that do not compromise the mission are needed. One way to accomplish this is to compete for utility services.

The Air Force spends over \$1 billion a year for utilities, and about \$550,000,000 for electricity alone. In 1984 Ellsworth AFB, South Dakota competed for a portion of its electric power needs. As of 30 September 1987, the base had saved over \$890,000 because of this competitive effort. This competitive effort resulted in litigation on the issue of whether an Air Force base is required to follow state created utility franchise arrangements. The Air Force won this litigation.

The purpose of this paper is to analyze the court case approving Ellsworth's electric competition, and to determine the usefulness of this case for other Air Force bases. If the Ellsworth example could be applied at other bases, the Air Force would realize tremendous savings. However, this case presented some rather unique facts that will limit its usefulness.

This paper was prepared for submission to the Air Force Law Review for publication consideration. The footnotes are in compliance with "A Uniform System of Citation", Twelfth Edition, The Harvard Law Review Association. Footnote references in the text are indicated by brackets; for example, [56].

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ABOUT THE AUTHOR

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Major Lawler received his commission through ROTC, and was designated a Distinguished Graduate. His first assignment was to the 91st Strategic Missile Wing, Minot Air Force Base, North Dakota as a Minuteman Missile Launch Officer and Wing Plans Officer.

From 1978 to 1981, Major Lawler attended law school. His first judge advocate assignment was at Seymour Johnson Air Force Base as an Assistant Staff Judge Advocate. He next served as an Area Defense Counsel at RAF Upper Heyford, United Kingdom.

In May 1985, Major Lawler became a member of the Air Force Utility Litigation Team, HQ USAF General Litigation Division. In this assignment, Major Lawler represented the Air Force and other affected federal agencies before state and local utility regulatory commissions in utility rate cases.

Major Lawler received a BA Degree in Political Science from the University of Iowa in 1973; and a MBA Degree from the University of North Dakota in 1978. He completed Squadron Officer School in residence in 1977 and Air Command and Staff College by correspondence in 1985.

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EXECUTIVE SUMMARY



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REPORT NUMBER

88-1540

AUTHOR(S)

MAJOR BRYAN T. LAWLER

TITLE

BLACK HILLS v. WEINBERGER: HOW USEFUL IS IT FOR OTHER
AIR FORCE BASES TO COMPETITIVELY ACQUIRE ELECTRICITY?

I. Purpose: To analyze Black Hills Power and Light Co. v. Weinberger, which approved competition for electric power at Ellsworth Air Force Base, and to determine the usefulness of this decision at other Air Force bases.

II. Discussion of Analysis: In 1984 Ellsworth Air Force Base needed additional electric power because of the B-1B program. Up to this time, a majority of the base's power came from the Western Area Power Administration (WAPA), a federal power marketing agency, over a federally owned power line. Instead of contracting with the state franchised electric utility, Black Hills Power & Light Company (Black Hills), Ellsworth competed for this additional power need. A company other than Black Hills won this competition, and Black Hills instituted litigation. The issue was whether Ellsworth had to comply with South Dakota utility franchise laws and regulations when it purchased the additional power. Both the United States District Court for the District of South Dakota and the United States Eighth Circuit

Court of Appeals held Ellsworth did not have to comply with South Dakota franchise laws. The District Court based its decision on the Supremacy Clause of the United States Constitution. The Circuit Court based its decision on the fact that 88 percent of Ellsworth AFB falls under exclusive federal jurisdiction. Ellsworth AFB has saved over \$890,000 dollars by competing this new power need. Therefore, if the Black Hills case is applicable to other bases, the Air Force could realize tremendous savings.

III. Findings: Not all Air Force bases exercise exclusive jurisdiction over their property. However, all Air Force bases could rely on the Supremacy Clause analysis the District Court applied. But there are two other problems that will drastically limit the cases applicability at other bases. First, only one other Air Force base has a federal power line serving it like Ellsworth AFB. Therefore, these other bases will have a delivery problem Ellsworth did not have. Second, Ellsworth competed for only its new electric load, and avoided Congressional concern over electric service competition. However, Congress added a rider to the Fiscal Year 1988 Appropriations Bill requiring federal agencies to follow state electric utility franchise laws in most cases. As a result, even bases competing for new loads only, like Ellsworth, may be precluded from competing for electricity.

IV. Conclusions and Recommendations: Because of the delivery problem and because of the Fiscal Year 1988 Appropriations Bill rider, the Black Hills decision will not be very useful at other Air Force bases. However, federal procurement law still requires full and open competition as a general rule, and the rider does contain some exceptions. In addition, the applicability of the rider to cases like Ellsworth AFB where only new load is competed is still a question. Therefore, because competition can save money, base contracting, engineering, and legal need to be aware of the limitations on electric competition, and must work to maximize savings where competition is possible.

Chapter One

INTRODUCTION

The federal budget deficit and the resulting Gramm-Rudman-Hollings deficit reduction mechanism [1] have meant cutbacks in federal agency budgets to include the Department of Defense budget [2]. The Air Force is being asked to perform the same mission with less money. Therefore, a way to save money without compromising the Air Force's mission is needed.

One possible way to save money and not compromise the mission is to compete for utility services. The Air Force spends almost a billion dollars each year for utility services such as natural gas, water, water treatment, fuel oil, and electricity [3]. Electric service alone costs the Air Force approximately \$550,000,000 annually [4]. The Air Force has already competed for natural gas service at Tinker AFB and the Air Force Academy resulting in significant savings [5]. In addition, Ellsworth AFB has competed for a portion of its electric power requirements and has saved over \$890,000 over the last three years [6]. These competitive efforts have saved money without adversely impacting the missions of these bases. However, the Ellsworth competition led to litigation because it challenged the traditional way electricity has been marketed in the United States.

The issue in the resulting litigation was whether the Air Force can compete for electric service when the state government has authorized only one electric utility supplier for the area that includes Ellsworth AFB [7]. Traditionally, state public utility commissions have granted electric utility companies the exclusive right to serve a certain territory. In consideration for granting this exclusive franchise, the state regulates the rates a utility company can charge. The theory is that allowing only one utility company to serve an area avoids duplication of expensive facilities and, therefore, is more efficient and less costly. In return for the exclusive franchise, the state regulates the utility company's rates to avoid monopoly pricing [8]. The Air Force challenged this traditional arrangement by competing for electric service at Ellsworth AFB [9]. The resulting litigation, which the Air Force won, is the subject of this paper.

The litigation was initiated by Black Hills Power and Light Company (Black Hills), the utility South Dakota granted the exclusive right to serve the area that includes Ellsworth AFB [10]. Black Hills challenged Ellsworth's competitive effort all the way to the United States Supreme Court in the case Black Hills Power and Light Company v. Casper Weinberger (Black Hills) [11]. Both the United States District Court for the District of South Dakota and the Eighth Circuit Court of Appeals upheld the electric service competitive effort [12]. The United States Supreme Court refused to review the case [13].

This paper will analyze the Black Hills case to determine how useful it is for other Air Force bases. First, the paper will detail the facts of the case. Second, the applicable federal procurement law will be discussed. Third, the paper will analyze the 8th Circuit Court of Appeals decision approving the Ellsworth electric service competition. Fourth, the facts, law, and legal reasoning will be analyzed to determine how useful the Black Hills case is for other Air Force bases. Finally, the paper will look at the Congressional response to electric competition as a possible limiting factor on the usefulness of the case at other bases.

If the Black Hills decision is useful at other bases, tremendous savings would be possible. The first step in analyzing this issue is to outline the facts of case.

Chapter Two

THE FACTS OF THE CASE

Ellsworth AFB is located in western South Dakota. The main operating base occupies 4,856.76 acres of which about 88% was ceded by South Dakota to the exclusive jurisdiction of the federal government [14].

Prior to 1984 Ellsworth was served by three electric utilities. The major portion of the base's power requirement (about 94%) was supplied by the Western Area Power Administration (WAPA) [15]. WAPA is a federal power marketing agency that sells hydroelectric power to preference customers authorized by Congress [16]. Federal agencies are preference customers for this federal hydroelectric power [17]. The WAPA power, which first started flowing to the base in 1955, comes into Ellsworth AFB over a federally owned power line [18].

Black Hills Power and Light Company serves the base Renal Heights housing area which, prior to 1984, amounted to approximately 5.3% of Ellsworth's power needs [19]. Black Hills is a South Dakota utility regulated by the South Dakota Public Utility Commission (PUC) [20]. In 1976 the South Dakota PUC granted Black Hills the exclusive right to serve the area that includes Ellsworth AFB [21].

The third utility, West River Electric Association, serves two other base housing areas. Prior to 1984 West River's service amounted to about 0.6 percent of the base's requirements [22].

In 1984 Ellsworth AFB needed more electric power because of the B-1B weapon system power requirements [23]. However, WAPA informed the base it could not provide the additional power requirements. Rather than merely purchasing this power from Black Hills, the franchised utility, base contracting competed this additional power need. WAPA, Black Hills, and West River would continue to serve their existing loads.

The base received five proposals for the additional power requirement [24]. Heartland Consumers Power District (Heartland) submitted the low bid of \$336,769.20 for one year's service based on the estimated electric power consumption for fiscal year 1985 [25]. Black Hills bid \$614,381.19 for the same requirement

resulting in an estimated savings of \$277,611.99 [26]. Ellsworth AFB contracting awarded Heartland a one year contract, and Heartland delivered the power over the federally owned power line [27]. This competitive effort in no way delayed or otherwise impeded the B-1B program implementation at Ellsworth AFB [28].

Heartland was also the low bidder for fiscal year 1986. For the fiscal year 1987 contract Basin Electric Power Cooperative was the low bidder [29]. Heartland was again the low bidder for the current fiscal year 1988 contract [30].

Not too surprisingly, Black Hills did not take this competition lying down. The company protested the competitive effort to the South Dakota PUC. Black Hills claimed Heartland was violating its exclusive franchise area by serving Ellsworth AFB [31]. The PUC ruled in favor of Black Hills holding it has jurisdiction over which utility company can serve Ellsworth AFB [32]. The PUC also held that Air Force procurement regulations recognize state jurisdiction in this area [33]. As a result, the Commission ordered that Black Hills Power and Light Company is entitled to serve the electric load Ellsworth AFB had solicited competition for [34]. The PUC furthered ordered that when Black Hills finished making arrangements to deliver power to Ellsworth AFB, then Heartland would be enjoined from serving the base [35].

Ellsworth AFB and Heartland appealed the PUC decision first to the South Dakota circuit courts, but then removed the case to the United States district court [36]. The United States District Court for the District of South Dakota and the United States Eighth Circuit Court of Appeals both ruled in favor of the base and Heartland [37]. Each court relied, in part, on federal procurement law in reaching their decisions.

Chapter Three

APPLICABLE FEDERAL PROCUREMENT LAW

The general rule for federal procurement is that full and open competition will be used whenever possible [38]. The reason for this rule is Congress has determined that competition for property and services helps make the contracting process more "economic and efficient" [39]. Full and open competition means "that all responsible sources are permitted to submit sealed bids or competitive proposals" [40]. The Competition in Contracting Act of 1984 reemphasized the full and open competition requirement and did not exempt utility service contracting [41]. Therefore, unless utility service contracting falls into an exception to the general rule, then full and open competition is required if competition is available. One exception to the general rule is the situation where there is only one responsible source for the property or service [42].

The Federal Acquisition Regulation (FAR) implements the full and open competition requirement [43]. The contracting officer has the discretion under the FAR to determine whether competition exists or not [44]. Again, the FAR contains no requirement that federal contracting officers follow state utility franchise laws [45].

In accordance with the Federal Property and Administrative Services Act [46] the General Services Administration (GSA) has responsibility for buying utility services for federal agencies. However, the GSA Administrator has delegated this authority to the Secretary of Defense for Department of Defense utility contracting [47]. The purpose of this delegation is to help ensure utility services are acquired at the minimum cost to the government [48].

Uniform Department of Defense utility service contracting procedures are in Armed Services Procurement Regulation (ASPR) Supplement No. 5, Procurement of Utility Services, 1 October 1974. This regulation also requires competition when it is available [49]. However, ASPR Supplement No. 5 also recognizes utility service competition may not be available very often because of the monopoly nature of the utility industry [50].

In 1986 the federal agencies attempted to revise the FAR

by updating and changing the rules for utility service contracting [51]. The revision would have incorporated the requirements of ASPR Supplement No. 5 into the FAR. But more importantly, the revision would have required base contracting officers to competitively purchase utility services without regard to the existence of state established exclusive franchise areas [52]. Under the ASPR Supplement No. 5 and the current FAR, a contracting officer can consider the existence of an exclusive franchise area as a situation where there is only one responsible source requiring no competition [53]. The proposed revision would have prevented this.

However, pressure on Congress from the electric utility industry prevented implementation of this proposed change [54]. The Congressional response to this proposal will be discussed in Chapters Four and Five. The end result is ASPR Supplement No. 5 is still the applicable regulation for Department of Defense utility contracting, and is the regulation the courts applied in the Black Hills case.

Chapter Four

LEGAL BASIS FOR THE BLACK HILLS v. WEINBERGER DECISION

The Eighth Circuit Court of Appeals (the court) heard oral argument in the Black Hills case on 9 June 1986 and issued its decision on 7 January 1987 [55]. As noted above, the court affirmed the decision of the United States District Court for the District of South Dakota approving Ellsworth AFB's competitive purchase of electricity [56].

The first basis for the court's decision was exclusive federal jurisdiction. The court noted that 88 percent of Ellsworth AFB is within the exclusive jurisdiction of the federal government [57]. South Dakota ceded this land to the United States in increments in 1945, 1950, and 1953 giving up all jurisdiction except service of criminal and civil process [58]. In accordance with Article I, Section 8, Clause 17 of the United States Constitution, Congress has the power to regulate federal enclaves such as Ellsworth AFB and bars state regulation unless there is Congressional approval [59]. Since the competitively contracted power comes into the base over a federal power line at a substation on land over which the United States has exclusive jurisdiction, the court held the South Dakota PUC has no jurisdiction to determine which utility can serve Ellsworth AFB [60].

The court rejected three arguments put forward to counter this federal enclave analysis. South Dakota and Black Hills first argued the PUC was not attempting to regulate Ellsworth AFB activities; rather, the PUC was only regulating the utility companies involved [61]. However, the United States Supreme Court has said in several cases a state cannot indirectly regulate sales on a federal enclave "where it had no authority to do so directly" [62]. To hold otherwise and allow a state to indirectly regulate such sales by designating which utility company can serve a federal enclave would clearly interfere with any attempt to compete for utility service. "[A] state cannot diminish the constitutional authority of the United States government by regulating the parties with whom it may contract" [63].

Second, the court rejected the argument that because 12 percent of Ellsworth AFB is not within a federal enclave, South

Dakota has jurisdiction over the entire base for utility service purposes [64]. The fact that some of the competitively acquired electricity might serve loads in this "12 percent" area was not seen as a justification for giving up jurisdiction over 88 percent of the base [65]. In addition, the court relied on the PUC's own justification for utility franchise territories-- "prevention of unnecessary duplication of electric facilities" to dispose of the "12 percent" argument [66]. WAPA already served Ellsworth AFB over existing federal facilities, and South Dakota and Black Hills never contested this arrangement [67]. The competitively purchased power comes in over these same facilities with no duplication. However, if South Dakota could assert jurisdiction over the entire base, duplicate facilities would be required to deliver Black Hills Power & Light electricity. Black Hills would have to construct a line to connect its existing system to the base system [68]. Therefore, the court reasoned the purpose of state franchise territories "would best be served if the United States had jurisdiction over the procurement and distribution of electric service for the entire base" [69].

Third, the court did not agree with the South Dakota and Black Hills argument that jurisdiction over the entire base for utility service purposes is constitutionally permissible because it does not interfere with federal jurisdiction [70]. In fact, the cases cited in their argument did allow state jurisdiction in a federal enclave because the courts found no such interference [71]. For example, in Howard v. Commissioners of the Sinking Fund the US Supreme Court approved the City of Louisville's annexation of a federal enclave because the action did not interfere with federal jurisdiction of the enclave [72]. In contrast, the court in this case found that state regulation of which utility can supply a federal enclave, "...directly interfered with the United States' control over the provision of electrical service within the base" [73].

To briefly recap, the first basis for the court's decision was South Dakota had no jurisdiction over which utility company could serve Ellsworth AFB because 88 percent of the base was a federal enclave. The Constitution bars state regulation on a federal enclave unless there is Congressional approval [74]. The next question the court had to address, then, was whether Congress had approved state regulation of utility suppliers on federal enclaves.

In the second part of its opinion, the court held that federal statutes and regulations do not defer to state franchise area rules and do permit the Ellsworth AFB competitive procurement of electricity [75]. As outlined in Chapter Three, federal procurement law requires full and open competition

whenever it's available [76]. Competition is not available if there is only one responsible source [77]. One of the factors in determining if a source is responsible is whether the prospective contractor "is otherwise qualified and eligible to receive an award under applicable laws and regulations" [78]. South Dakota and Black Hills argued that South Dakota franchise law is "applicable law", and, therefore, Black Hills as the franchised supplier is the only responsible source for Ellsworth AFB's additional power requirement [79]. The court disagreed with this analysis by pointing out the "applicable law" factor does nothing to change the discretionary power given federal contracting officers to determine whether competition exists [80]. In other words, while state franchise law can be considered, it does not control the decision as to whether competition exists or not.

South Dakota's and Black Hills' principle argument, however, was that the Armed Services Procurement Regulation (ASPR) Supplement No. 5, DoD's uniform utility service acquisition regulation, specifically defers to state utility franchise regulations. They cited paragraph S5-104.1, titled "Determination as to the Existence of Competition" and zeroed in on the first sentence of subparagraph (a) which states:

(a) Although in most instances utility service suppliers operate in franchised territory, competition may nevertheless exist--for example, where more than one supplier is franchised for a given location, or where more than one supplier is able to provide service at a given location but no supplier has yet been franchised for that location.

South Dakota and Black Hills argued this provision specifies that competition only exists for utility service if more than one utility is franchised for the area, or where no utility company has yet been given a franchise for an area [81]. In this case only Black Hills has a franchise to serve the area that includes Ellsworth AFB [82]. Therefore, according to South Dakota and Black Hills, there was no competition for Ellsworth's additional power requirement [83].

The court, as did the District Court, rejected this line of reasoning by holding paragraph S5-104.1 "applies only to new military installations or existing installations being served by only one supplier" [84]. Ellsworth does not fit either category. However, the court went on to say that even in cases where paragraph S5-104.1 does apply,

...the main concern is whether competition exists as a practical matter. While state franchise territories may indicate that competition is not possible, their existence does not preclude the United

States from making this determination. [85]

Therefore, contrary to the position of South Dakota and Black Hills, the court interpreted the first sentence of S5-104.1 as descriptive of the utility industry rather than as a limit on the discretion of a contracting officer in deciding whether competition exists.

To again summarize, the court held that federal law and regulations do not defer to state utility franchise laws. The decision as to whether utility service competition exists or not is left to the discretion of the federal contracting officer involved. However, a rider to the fiscal year 1987 Appropriations Bill dealing with utility service competition required the court to look further at Congressional intent regarding state utility service regulation on a federal enclave.

The rider was in response to the proposed change to the Federal Acquisition Regulation (FAR) requiring base contracting officers to purchase utility services competitively without regard to the existence of state established exclusive franchise areas [86]. This proposed change was discussed more fully in Chapter Three. In response to extensive lobbying by the electric industry, Congress added the rider which prevented use of fiscal 1987 funds to implement the proposed change to the FAR [87]. The legislative history to this rider indicated that Congress was concerned that utility service competition by federal agencies would increase costs to the remaining ratepayers if these agencies abandon the local utility system [88]. South Dakota and Black Hills argued the rider and the legislative history clearly showed that Congress intended that federal agencies follow state franchise area regulations when determining if utility service competition exists [89].

The court did not agree with this conclusion. First of all, the court pointed out the rider merely left ASPR Supplement No. 5 in effect which gives the contracting officer the discretion to decide whether competition exists or not [90]. Furthermore, the court had already held that ASPR Supplement No. 5 does not defer to state utility franchise area regulations [91]. Secondly, the court reasoned that Congress was concerned with one specific situation when it added the rider: "...one in which a federal facility that obtains all of its electricity from a single utility switches suppliers and abandons a local utility system that has already built the necessary capacity" [92]. In this case Ellsworth AFB did not abandon any local utility system. Black Hills, WAPA, and West River Electric Association still serve the same loads they served before the competition [93]. All the competitive effort did was to add another utility supplier to serve the increased requirements of the B-1B program.

As a result, the court concluded the rider did not apply to the Ellsworth AFB situation [94].

In summary, the Eighth Circuit Court of Appeals upheld Ellsworth AFB's competition for electricity because 88 percent of the base is a federal enclave and because federal law and regulations do not defer to state utility franchise arrangements. The court also concluded the Fiscal Year 1987 Appropriations Bill rider did not apply to the Ellsworth AFB competitive effort.

Because this competitive effort has resulted in significant savings, the next question is how useful is this decision for other Air Force installations?

Chapter Five

USEFULNESS OF THE DECISION AT OTHER AIR FORCE BASES

Ellsworth AFB saved \$896,884.00 from October 1984 to September 1987 by competing for its additional electric power needs rather than buying this power from Black Hills [95]. If Ellsworth's example could be followed at other Air Force bases, the Air Force could realize significantly more savings. However, can other bases use the Ellsworth example and the Black Hills decision to save money on their electric bills?

The first question is whether other bases fit within the legal basis for the Black Hills decision. The first basis for the decision was that 88 percent Ellsworth AFB falls within exclusive federal jurisdiction. Therefore, the court held South Dakota has no jurisdiction to impose its utility franchise rules on the base [96]. Unfortunately, not all Air Force bases exercise exclusive federal jurisdiction over their property [97]. Some Air Force bases exercise only concurrent jurisdiction where "...the state concerned has reserved to itself the right to exercise concurrently with the United States, all the same authority" [98]. Still other Air Force bases exercise only proprietary jurisdiction where the federal government has acquired ownership of the land but has not obtained any legislative authority from the state [99]. As a result, the first basis for the court's opinion, exclusive federal jurisdiction, would not apply to all Air Force bases.

The second basis for the decision was that federal procurement law does not defer to state utility franchise regulations [100]. However, this analysis was tied to the first basis of the decision--exclusive federal jurisdiction--to determine if Congress had allowed state utility service regulation on a federal enclave [101]. Again, not all Air Force bases have federal enclave status [102]. But would these same federal procurement laws and regulations alone preclude state utility service regulation on a base regardless of jurisdiction?

The Eighth Circuit Court of Appeals did not have to address this issue since 88 percent of Ellsworth AFB is a federal enclave. The District Court, however, took a different approach and based its opinion approving the Ellsworth competitive effort on the Supremacy Clause of the United States Constitution [103].

This provision makes federal law the supreme law of the land. Any conflicting state or local law is not controlling unless Congress has explicitly approved such regulation of federal instrumentalities [104]. The District Court held that federal procurement law which requires competition and state utility franchise regulations which allow monopolies are conflicting [105]. In addition, the District Court determined Congress had not explicitly provided for state utility service regulation on military bases [106]. Therefore, the lower court concluded South Dakota could not enforce its utility franchise regulations on Ellsworth AFB [107]. Since the federal procurement law and regulations cited by the District Court apply to all Air Force bases, the Supremacy Clause would preclude state utility service regulation from dictating the electric utility supplier on all Air Force bases [108].

Using this Supremacy Clause analysis, it would appear all other Air Force bases could benefit from the Black Hills decision. But there are two problem areas that will limit the decision's usefulness elsewhere--delivery of the electricity and politics.

The first potential problem for an Air Force base wanting to compete for electric service is getting the competitively acquired power to the base. Ellsworth AFB receives its competitively acquired electricity through the same federal power line the WAPA power already comes into the base over [109]. No new arrangements were required. Unfortunately, only one other Air Force base is served by a federal power line [110]. The other bases are served by power lines owned by the local utility [111]. The delivery problem would come into play if this local utility company did not win the competition. How would the base get the electricity?

One solution would be to attempt to contract with the local utility to deliver the power from the low bidder to the base. If the local utility agreed to do this at a reasonable rate, the problem would be solved. However, it is very unlikely this local utility would voluntarily agree to such an arrangement at a reasonable rate. Before the Air Force base's electric power competition, the local utility most likely held a monopoly position due to the state exclusive franchise regulations. If this company agreed to deliver power from a competitor, it would give up a portion of its monopoly position. Remember that Black Hills Power & Light fought very hard to protect its exclusive franchise area [112].

The next logical place to turn if the local utility company refuses to deliver the purchased electricity would be the federal statutes. Has Congress provided that a federal agency can force a utility company to deliver purchased electricity? While the

purpose of this paper is not to do a detailed analysis of this question, a brief discussion will show the difficulties an Air Force base would face.

The Federal Power Act (FPA) [113] gives the Federal Energy and Regulatory Commission (FERC) the power to regulate "...the transmission of electric energy in interstate commerce and ...the sale of electric energy at wholesale in interstate commerce..." [114]. Within this general authority, Congress gave the FERC power to order a utility company to transmit or "wheel" electric energy over its lines for another utility if several conditions are met [115]. One of these conditions is the "wheeling" service order must "...reasonably preserve existing competitive relationships" [116]. It may prove difficult to convince the FERC "wheeling" to facilitate competition preserves the existing competitive relationship. But even if this hurdle could be overcome, Congress placed several limitations on FERC's authority to order "wheeling". One of these limitations is "No order may be issued ... which provides for the transmission of electric energy directly to an ultimate consumer" [117]. If an Air Force base is an "ultimate consumer", then the FERC has no authority to order the local utility company to deliver the purchased electricity to an Air Force base.

The Army tried on two occasions to convince the FERC and the federal courts that the military installations involved were not totally "ultimate consumers" [118]. The Army argued that the installations were actually electricity wholesalers since a portion of the power each facility purchased was resold or redistributed to other agencies and private entities on the post. The Federal Power Commission (predecessor to the FERC) and the courts held in both cases the Army installations were not electric wholesalers because transfers to other federal agencies are not sales [119]. In addition, the sales to private entities on the posts (banks, credit unions, etc.) were not viewed as large enough to call the facilities electric wholesalers [120]. Given this interpretation of the Federal Power Act, an Air Force base is an "ultimate consumer" and would not be able to use federal law to force the local utility to deliver its competitively purchased electricity [121].

If federal law offers no help, could an Air Force base turn to state law for assistance in forcing the local utility to deliver the electricity? Again, this paper will not attempt to survey the law of the 50 states to see what authority the state utility commissions have in this area. However, it must be remembered it is the states through their utility commissions that set up the exclusive franchise territories in the first place. They did this on the theory it is in the public interest [122]. Therefore, the states and their utility commissions most likely would not agree to help an Air Force base disrupt their regulatory scheme.

In addition, the states and their utility commissions may feel they lack jurisdiction to deal with the "wheeling" issue. The Air Force, representing the federal executive agencies, sought an order from the Colorado Public Utilities Commission ordering Public Service Company of Colorado (PSCO) to deliver over its power lines federal hydroelectric power to Lowry AFB, the Department of Energy's Rocky Flats Technical Center, and the Denver Federal Center [123]. The Commission's Hearing Examiner ruled the Colorado Commission has no jurisdiction to order PSCO to deliver the federal power because the transaction would involve the interstate transmission of energy [124]. Since a portion of the federal hydropower would come from outside Colorado and because PSCO's transmission system is part of the interstate transmission grid, the examiner concluded only the FERC has jurisdiction [125].

However, the Colorado Public Utilities Commission reversed this decision and held it has jurisdiction in this case [126]. But this issue is a far from settled. No other utility commission nor the FERC or the federal courts have ruled on this specific issue [127]. Therefore, even if a state commission were willing to order a utility company to deliver competitively purchased electricity to an Air Force base, it may find it has no jurisdiction in the matter.

If resort to federal and state law is fruitless, another option would be to construct a new power line connecting the successful bidder and the base. This would get the electricity to the base, but there are several potential problems with this option. The first problem is the time required to build such a line. Depending on the distance and terrain, the time needed for construction could be considerable.

But an even more serious problem is the cost of the new line [128]. Would the cost of the new line offset the potential savings from competition? In addition, who would pay for the line? If the Air Force had to pay, then construction funds would have to be sought from Congress. But again, this process would take time, and Congress may find it difficult to fund new power lines when it is trying at the same time to balance the federal budget [129]. If the electric power contractor pays for the new line, he would demand a lengthy contract to ensure he gets his investment back. While the Air Force can enter into 10-year utility contracts [130], such an arrangement would limit the base's flexibility to react to changes in prices if its locked into a contract for several years.

Finally, the base would have to consider the potential environmental impact of a new power line, and the public reaction to such environmental impact [131].

But even if the delivery problem could be solved, there is still a political problem the base would have to deal with. Recall that Congress added a rider to the fiscal year 1987 Appropriations Bill preventing the use of 1987 funds to implement the proposed change to the FAR requiring utility service competition [132]. The legislative history indicated Congress was concerned that federal facilities would abandon local utility systems and adversely impact the remaining ratepayers [133]. The Eighth Circuit Court of Appeals said this rider did not impact Ellsworth AFB's competitive effort because the base did not abandon any utility system [134]. If an Air Force base only sought competition for new power requirements, then this political problem would not exist. However, bases that would seek competition for their existing electric loads would have to face the possibility of abandoning the local utility. This would result in a real or at least perceived adverse impact on the remaining ratepayers.

Of course, this rider is no longer in effect since it was attached to an annual appropriations bill. But Congress attached an apparently even more restrictive rider to the fiscal year 1988 Appropriations Bill [135]. This rider states:

None of the funds appropriated or made available by this or any other Act with respect to any fiscal year may be used by any Department, agency, or instrumentality of the United States to purchase electricity in a manner inconsistent with state law governing the provision of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state approved territorial agreements...

In the fiscal year 1987 rider, Congress only stopped implementation of the proposed FAR change [136]. Congress now apparently requires that federal agencies follow state utility franchise laws and regulations regardless of a base's jurisdictional basis or procurement law competition requirements. However, the rider does contain some exceptions.

The rider states that federal agencies cannot purchase electricity, "...inconsistent with state law governing the provision of electric utility service..." Therefore, bases in locations where no electric utility has received a franchise or where two or more electric utilities are franchised can still compete if the delivery problem can be solved. Secondly, the rider does not apply to bases building their own electric generation facilities or to base projects for electric energy conservation [137]. Finally, the new rider does not apply if the franchised utility cannot meet a base's electric power reliability requirements.

These exceptions, clearly, still provide some opportunities to compete for electricity. The question now is how does the rider apply to a case like Ellsworth AFB? The Ellsworth example does not fit any of the exceptions contained in the rider unless, of course, reliability became a problem. But remember, Ellsworth only competed for its additional power needs [138]. The legislative history to this rider, like the fiscal year 1987 rider, states Congress is concerned that electric competition will adversely impact other ratepayers if federal agencies are allowed to abandon a local utility [139]. Ellsworth AFB did not abandon any local utility system. Likewise, bases that only compete for new electric loads would not abandon any local utility. If the problem Congress is concerned about does not exist, does the rider apply? As of this writing, the Air Force Utility Litigation Team was determining the scope of the fiscal year 1988 utility competition rider [140].

In summary, the Black Hills decision will not be very useful for other Air Force bases. Other bases wanting to compete for electricity will have to solve the delivery problem that Ellsworth did not have. But more importantly, the fiscal year 1988 Appropriations Bill rider concerning electric service competition may prove to be, with a few exceptions, an insurmountable barrier to further competitive efforts at other Air Force bases.

Chapter Six

CONCLUSIONS AND RECOMMENDATIONS

Ellsworth AFB personnel took a bold and innovative course when they competed the additional power requirements for the B-1B program. This action, which was upheld in the Black Hills decision has resulted in significant savings on the base's electric bill, and it has not delayed or hindered in any way the B-1B program at Ellsworth AFB [141]. In this time of Gramm-Rudman-Hollings, budget deficits, and budget cuts, such methods of saving money that do not compromise the Air Force mission are desperately needed. If the Ellsworth example could be used at other Air Force bases, then the Air Force could realize even more significant savings.

From a purely constitutional and procurement law point of view, it would appear all other Air Force bases could follow the Ellsworth example because of the Supremacy Clause of the United States Constitution. Federal procurement law mandates full and open competition when a federal agency buys property or services to include utility services [142]. In contrast, state utility regulations authorize exclusive franchise territories for electric utilities which precludes competition [143]. The Supremacy Clause resolves this conflict in favor of the federal requirement for full and open competition [144].

However, the Ellsworth case presented a rather unique factual situation. First, Ellsworth AFB did not have a delivery problem because the competitively acquired electricity comes into the base over a federal power line [145]. Only one other Air Force base has such a line [146]. Other bases would have to seek the cooperation from the local utility or build a new power line as federal and state law does not force the local utility to the power.

The second unique fact is Ellsworth only competed for its additional power requirements. The base did not abandon any utility system by competing for this additional requirement. Ellsworth, therefore, avoided Congressional concern that competition would mean increased costs for ratepayers of abandoned utility systems [147]. The question now is whether competition for new loads only falls within the restriction of the fiscal year 1988 Appropriation Bill electric competition rider. If so, then very few bases will be able to compete for electric service.

In summary, while the Ellsworth competitive action and the Black Hills decision approving it would appear to open the door to electric service competition at other Air Force bases, the unique facts of the case and the new Appropriations Bill rider will limit the decision's usefulness beyond Ellsworth AFB.

The Air Force, however, should not let the delivery and potential political problems deter further efforts at electric service competition. After all, federal procurement law still requires competition and significant savings are possible. Rather, Air Force contracting officers, engineers, and attorneys need to be aware of the limitations, and they must work to maximize savings where competition is still possible.

The Black Hills decision does not guarantee other Air Force bases will be able to compete their electric power needs. However, tighter Air Force budgets coupled with the potential savings competition can achieve require that each Air Force base explore the possibility.

FOOTNOTES

1. The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1038 (Relevant portions codified in 2 U.S.C. and 18 U.S.C.).
2. Id.; Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203; Fiscal Year 1988 Continuing Appropriations Bill, Pub. L. 100-202. The Gramm-Rudman cuts would have meant a 10.5% cut in FY 1988 nonpersonnel defense outlays. Due to the budget summit agreement raising some taxes, the defense budget was cut by about \$5 billion.
3. Major Command Consumption Report, 17 July 1987, HQ Air Force Engineering and Services Center (AFESC)/DEMB, Tyndall AFB, FL.
4. Id.
5. Tinker AFB, OK saved \$3.6 million for the period 1 May 1986-30 April 1987 per 2854CES/DEEY. The Air Force Academy saved \$192,304 for the period 1 June 1987-30 November 1987 per HQ USAFA/DEMA.
6. Report from 44CES/DEED. From 1 October 1984 through 30 September 1987 Ellsworth AFB saved \$896,884.51 based on what Black Hills Power & Light would have charged for the same electric power consumption.
7. Black Hills Power and Light Co. v. Weinberger, 808 F. 2d 665, 666 (8th Cir. 1987), cert. denied, 98 L Ed 2d 36 (1987).
8. IRSTON R. BARNES, THE ECONOMICS OF PUBLIC UTILITY REGULATION, Chapter III (1942).
9. Black Hills, supra note 7, at 667.
10. Id. at 666; Public Utilities Commission (PUC) of the State of South Dakota, In the Matter of the Complaint of Black Hills Power and Light Company Against Heartland Consumers Power District With Regard to Electric Service To Ellsworth Air Force Base, Decision and Order (F-3513), 4 February 1985 [hereinafter cited as PUC Dec.] at 45a.

11. Black Hills Power & Light Co. v. Weinberger, Civ 85-5031, 85-3015, 85-4068, 85-5064, slip op. (D.S.D. October 16, 1985; 808 F. 2d 665 (8th Cir. 1987)), cert. denied, 98 L Ed 2d 36 (1987).
12. Id.
13. Id.
14. Id. at 666.
15. Id. at 667.
16. 42 U.S.C. Section 7152(a)(1)(E), (a)(3) (1982); WILLIAM F. FOX, JR., FEDERAL REGULATION OF ENERGY at 795-796, 800 (1983).
17. 43 U.S.C. Sec. 485(h)(c) (1982).
18. Per 44CES/DEED; United States' brief before the 8th Circuit Court of Appeals [hereinafter, U.S. brief] at 7.
19. Black Hills, supra note 7, at 666-667.
20. Id. at 666; PUC Dec., supra note 10, at 49a.
21. Black Hills, supra note 7, at 669, fn 3.
22. Id. at 667.
23. Id. at 667; per 44CES/DEED telephone report.
24. Id. at 667.
25. Id. at 667.
26. Id. at 667.
27. Id. at 667; U.S. brief, supra note 18, at 7.
28. Per 44CES/DEED telephone report.
29. Id.; bid sheets supplied by 44CES/DEED.
30. Id.
31. PUC Dec., supra note 10, at 41a.
32. Id. at 49a.
33. Id. at 50a.

34. Id. at 55a-56a.
35. Id. at 56a.
36. Black Hills, supra note 7, at 668.
37. Black Hills, supra notes 7 and 11.
38. 10 U.S.C. Sec. 2301(a)(1) (Supp. IV 1986); Black Hills, supra note 7, at 671 citing Paul v. United States, 371 U.S. 245, 263 (1962).
39. 10 U.S.C. Sec. 2301(a) (Supp. IV 1986).
40. 41 U.S.C. Sec. 403(7) (Supp. III 1985).
41. Competition in Contracting Act of 1984, Pub. L. 98-369, 98 Stat. 1175 (relevant portions codified in scattered sections of 10 U.S.C. and 41 U.S.C.).
42. 10 U.S.C. Sec. 2304(c)(1) (Supp. IV 1986); 41 U.S.C. 403(8) (Supp. III 1985).
43. 48 C.F.R. Section 6.101 (1986).
44. Black Hills, supra note 7, at 672.
45. Id. at 672.
46. 40 U.S.C. Sec. 481(a)(1) (1982).
47. 15 Fed. Reg. 8227 (Dec. 1, 1950) (adopted as amended at 41 C.F.R. Section 101-33.002 (1986)).
48. Id. at para. 2b.
49. Armed Services Procurement Regulation Supplement No. 5, 1 October 1974, paragraph S5-104.1. See 48 C.F.R. Section 208.3 (1986).
50. Id. at paragraph S5-104.1(a).
51. 51 Fed. Reg. 16988 (May 7, 1986).
52. Id. at paragraph 41.104(b).
53. Black Hills, supra note 7, at 673.
54. 51 Fed. Reg. 36970 (October 16, 1986); HQ USAF/JACL-ULT, Tyndall AFB, FL. The Federal Acquisition Regulation Secretariate received 143 written comments to the proposed change opposing its implementation.

55. Black Hills, supra note 7, at 665.
56. Id. at 676.
57. Id. at 666.
58. Id. at 668.
59. Id. at 668 citing Paul v. United States, 371 U.S. 245, 263 (1962). A federal enclave denotes an area over which the federal government exercises exclusive jurisdiction.
60. Id. at 669; U.S. brief, supra note 18, at 7.
61. Id. at 669.
62. Id. at 669 citing Pacific Coast Dairy, Inc. v. Department of Agriculture of California, 318 U.S. 285, 295 (1943).
63. Id. at 669, fn 4.
64. Id. at 669-670.
65. Id. at 670.
66. Id. at 670 citing PUC Dec., supra note 10, at 50a.
67. Id. at 670; PUC Dec., supra note 10, at 50a-51a, 53a.
68. PUC Dec., supra note 10, at 48a. The PUC also found that Black Hills could contract with WAPA to deliver power to Ellsworth AFB in lieu of constructing new power lines.
69. Black Hills, supra note 7, at 670.
70. Id. at 670-671.
71. Id. at 670-671 citing Howard v. Commissioners of the Sinking Fund, 344 U.S. 624 (1953); United States v. City of Bellevue, 474 F. 2d 473 (8th Cir.), cert. denied 414 U.S. 827 (1973); Bartsch v. Washington Metropolitan Area Transit Commission, 357 F. 2d 923 (4th Cir. 1966) (per curiam).
72. Howard, supra note 71, at 626-627.
73. Black Hills, supra note 7, at 671.
74. Id. at 668.
75. Id. at 672.

76. 10 U.S.C. Sec. 2301(a)(1), 2304(a)(1)(A) and (B) (Supp IV 1986); 48 C.F.R. Sec. 6.101 (1986).
77. 10 U.S.C. Sec. 2304(c)(1) (Supp. IV 1986); 41 U.S.C. Sec. 403(8) (Supp. III 1985).
78. 41 U.S.C. Sec. 403(8) (Supp. III 1985).
79. Black Hills, supra note 7, at 672.
80. Id. at 672-673.
81. PUC Dec., supra note 10, at 46a, 50a.
82. Id. at 45a. A portion of Ellsworth AFB is in West River Electric Association's franchise area. However, the PUC determined that Black Hills should serve the load in question because a majority of this load is in Black Hills' franchise area. PUC Dec. at 54a.
83. Id. at 46a; Black Hills' brief to the Eighth Circuit Court of Appeals [hereinafter Black Hills' brief] at 29-31.
84. Black Hills, supra note 7, at 673.
85. Id. at 673.
86. The proposed change to the FAR is at 51 Fed. Reg. 16988 (May 7, 1986); the rider that applied to the Department of Defense is at Pub. L. 99-591, Section 9111. "None of the funds appropriated or made available by this Act shall be used to implement or enforce the rule proposed on May 7, 1986 (51 Fed. Reg. 16988-16991) or section 8.304-91 of the Air Force FAR Supplement issued on June 24, 1985."
87. Pub. L. 99-591, Section 9111; see note 54.
88. 132 Cong. Rec. H10728 (daily ed. October 15, 1986).
89. South Dakota and Black Hills Petition for Rehearing and Suggestion of Rehearing In Banc before the Eighth Circuit Court of Appeals at 7-8.
90. Black Hills, supra note 7, at 675.
91. Id. at 673.
92. Id. at 675.
93. Id. at 675.
94. Id. at 675.

95. Report from 44CES/DEED; see note 6.
96. Black Hills, supra note 7, at 669.
97. Brancato, Base Commander Responses to Civilian Misconduct: Systems and Problems for the Staff Judge Advocate, 19 A.F.L. Rev. 111, 149 (1977); Hammack, Annexations of Military Reservations By Political Subdivisions, 11 Mil. Law Rev. 99, 104-105 (1961).
98. 11 Mil. Law Rev., supra note 97, at 104.
99. Id. at 105.
100. Black Hills, supra note 7, at 672.
101. Id. at 671.
102. 19 A.F.L. Rev., supra note 97, at 149.
103. U.S. CONST. art. VI, cl. 2.
104. Black Hills, supra note 11, at 6-7, citing Hancock v. Train, 426 U.S. 167, 178 (1976).
105. Id. at 11.
106. Id. at 11.
107. Id. at 15.
108. 10 U.S.C. Sec. 2304(a)(1)(A)(B) (Supp. IV 1986); 48 C.F.R. Sec. 6.101 (1986).
109. U.S. brief, supra note 18, at 7.
110. HQ AFESC/DEMB, Tyndall AFB, FL; Fairchild AFB, WA is served by a Bonneville Power Administration power line and a Washington Water Power Company power line.
111. Id.
112. Black Hills appealed to the South Dakota PUC, Federal District Court, the Eighth Circuit Court of Appeals, and applied for a Writ of Certiorari from the United States Supreme Court.
113. 16 U.S.C. Sec. 791a, et. seq. (1982).
114. Id. at section 824(b)(1).

115. 16 U.S.C. Sec. 824j (1982).
116. 16 U.S.C. Sec. 824j(c)(1) (1982).
117. 16 U.S.C. Sec. 824j(c)(4) (1982).
118. Cities Service Gas Company, 35 FPC 571 (1966); this same case returned to the FERC in Secretary of the Army v. Cities Service Gas Company, 2 FERC P 61,069 (1978), affirmed, 609 F.2d 543 (CA DC 1979). The second case was Secretary of the Army v. The Atlantic Seaboard Corp., 39 FPC 346 (1967), reversed and remanded 425 F.2d 496 (DCCA 1969), on remand Secretary of the Army v. Atlantic Seaboard, 46 FPC 565 (1971).
119. See note 118.
120. See note 118.
121. The United States argued in the Black Hills case that sales by the contractor to Ellsworth AFB are at wholesale. Black Hills, supra note 7, at 675, fn 10. The PUC found the sales are retail under South Dakota law, PUC Dec., supra note 10, at 51a. Neither the District Court nor the Eighth Circuit Court of Appeals reached this issue.
122. PUC Dec., supra note 10, at 50a; BARNES, supra note 8.
123. The United States Federal Executive Agencies v. Public Service Company of Colorado, Case No. 6551 (April 14, 1986).
124. Id., Recommended Decision No. R87-1378 (October 6, 1987).
125. Id. at 10.
126. Id., Commission Decision and Order Denying Exceptions No. C87-1721 at 9 (December 23, 1987). While the Commission found the requested "wheeling" service involved the interstate transmission of electricity, it held that the Federal Power Act (16 U.S.C. 791a, et. seq.) does not preempt state regulation of electric transmission to retail customers, Commission Order at 9. However, the Commission denied the federal agencies' request because the federal agencies failed to show the transmission service would only have an incidental effect on interstate commerce and that there would be a legitimate local interest, citing, Pike v. Bruce Church, 397 U.S. 137 (1970).

127. Prior to the Colorado Public Utilities Commission Order C87-1721, no commission or court had ruled on the specific question of a State's authority to order a utility company to "wheel" electricity to one of its retail customers. The cases cited by the parties dealt with accounting practices, Federal Power Commission v. Florida Power and Light Co., 414 U.S. 453 (1952); rates for transmission of co-generated power, Florida Power & Light Co., 29 FERC paragraph 61,140 (1984); sales of natural gas in interstate commerce, Pennsylvania Gas Co. v. Public Service Commission, 252 U.S. 23 (1920) and Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission, 341 U.S. 329 (1951).
128. The Western Area Power Administration uses an average cost of \$100,000 per mile to build high voltage transmission lines in their cost estimates.
129. See notes 1 and 2.
130. 40 U.S.C. Sec. 481(a)(3) (Supp III, 1985). This 10-year contracting authority was delegated to the Secretary of Defense in the Statement of Areas of Understanding Between Department of Defense and General Services Administration, 15 Fed. Reg. 8227 (Dec. 1, 1950) (adopted as amended at 41 C.F.R. Section 101-33.002 (1986)). This authority is at paragraph S5-105.3(a), Armed Services Procurement Regulation Supplement No. 5 (1 October 1974).
131. ELECTRICITY AND THE ENVIRONMENT, West Publishing Co. (1972). Although dated, this Report of the Association of the Bar of the City of New York, New York, estimated three million acres of land will be needed for new transmission lines by 1990. See: B. CASPER AND P. D. WELLSTONE, POWERLINE (1981) about the protests in Minnesota over construction of a high voltage transmission power line.
132. Pub. L. 99-501, supra note 86.
133. 132 Cong. Rec. H10728, supra note 88.
134. Black Hills, supra note 7, at 675.
135. Fiscal Year 1988 Continuing Appropriations Bill, Pub. L. 100-202, Sec. 8093.
136. Pub. L. 99-591, Sec. 9111. See note 86.
137. The rider cites 10 U.S.C. 2394 (Supp. IV 1986) that gives the Department of Defense 30-year contracting authority for energy production facilities. The rider also cites 42 U.S.C. 8287 (Supp. IV 1986) that gives federal agencies 25-year contracting authority for shared energy savings

projects where agencies share energy cost savings with the contractor.

138. Black Hills, supra note 7, at 667.
139. House Report 100-211, Treasury, Postal Service, and General Government Appropriation Bill (July 9, 1987).
140. HQ USAF/JACL-ULT, Tyndall AFB, FL. The Team is also looking at the question of whether an annual appropriations bill rider is binding in subsequent fiscal years.
141. 44 CES/DEED telephone report.
142. 10 U.S.C. Sec. 2304(a)(1)(A) and (B) (Supp IV 1986).
143. BARNES, supra note 8.
144. U.S. CONST. art. VI, cl. 2.
145. U.S. brief, supra note 18 at 7.
146. HQ AFESC/DEMB. See note 110.
147. Black Hills, supra note 7, at 675.

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